

Case No. 79573-8

IN THE SUPREME COURT FOR  
THE STATE OF WASHINGTON

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CALVIN AND GLORIA FISK,

Appellants,

v.

CITY OF KIRKLAND,

Respondents.

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**SUPPLEMENTAL BRIEF OF RESPONDENT  
CITY OF KIRKLAND**

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## I. LEGAL ARGUMENT

Firefighting is undisputedly a governmental function. The inextricably related task of *supplying water for firefighting* is likewise a governmental function. Firefighting is a tax-funded service that benefits the public generally, not just rate-paying customers. Thus, the City of Kirkland did not owe a legal duty to any specific homeowner (or passing motorist, such as Plaintiffs) to protect their home (or RV) from fire. The fact that the water supply system may also be used to provide drinking water to rate-paying customers does not alter this fact.

### A. FIREFIGHTING IS A PUBLIC DUTY.

Fighting fires is a *public service*, and does not create duties owed to any specific individual. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 30 P.3d 1261 (2001). This Court in *Babcock* held that “the duty to fight fires is a duty to the community, and not a duty to specific persons and property.” *Id.* at 792. Thus, there can be no cause of action for “negligent firefighting.”

Similarly, Illinois law provides that:

... a municipality owes the public no general duty of fire protection and that it therefore cannot be liable either for failing to provide or negligently providing fire protection services.

*Pierce v. Village of Divernon, Ill.*, 17 F.3d 1074, 1077 (7<sup>th</sup> Cir. 1994)

(interpreting Illinois law).

The Missouri courts treat fire prevention services as a public duty:

The creation of a municipal fire department is for the benefit of the general public. Ordinarily, a municipality bears no liability for any act or omission of the municipality associated with the performance of fire service, a governmental function. As such, the city owed no duty to the [plaintiffs].

*O'Dell v. City of Breckinridge*, 859 S.W.2d 166, 168 (Ct. App. Mo. 1993).

Thus, the plaintiff could not prove negligence under the "public duty doctrine." *Id.*

**B. SUPPLYING WATER FOR FIREFIGHTING PURPOSES IS A PUBLIC DUTY AS WELL.**

A uniform and well-reasoned line of cases from across the country concludes that the *supply of water* for firefighting purposes is also a governmental function.<sup>1</sup>

The District of Columbia Court of Appeals decision in *Nealon v. District of Columbia*, 669 A.2d 685 (D.C. App. 1995) is directly on point. The *Nealon* court considered the question of whether the District could be held liable for low water pressure, which allowed the destruction of homes by fire. The Court rejected this theory:

The provision of water service to a fire hydrant may be viewed as part of the city's fire protection function. The

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<sup>1</sup> Every published decision located by Respondent has concluded that a city's providing water for firefighting services is a *governmental function*.

availability of an adequate water supply is essential to that service. Indeed, claims of a municipality's failure to provide sufficient water for firefighting purposes have been considered by other courts as a failure to provide fire protection. This approach is reasonable and logical, considering the purposes for which water provided through the fire hydrants is used.

*Id.* at 690 (emphasis supplied). The Court ultimately held that "the District's provision of a water supply for its fire hydrants is related to, if not part of, its function of providing fire protection." *Id.* at 691. Thus, the Court concluded that water supply for firefighting was a "governmental function." *Id.*

The law is the same in Massachusetts. There, the Supreme Judicial Court held as follows:

The duty to provide an adequate supply of water for fighting fires, consistent with the general duty to provide fire protection is a duty owed to the public at large. The duty to keep and inspect hydrants and water lines is thus also a duty owed to the general public. That a hydrant in a state of disrepair is in the vicinity of the Salustis' property is not sufficient to create a special duty.

*Salusti v. Town of Watertown*, 635 N.E. 2d 249, 251 (Mass. 1994) (emphasis supplied).

The Court in *Blancovitch v. City of New York*, 516 N.Y.S.2d 77 (Sup. Ct. NY 1987) similarly held:

A municipality owes no special duty to particular persons to provide an adequate water supply to fight fires or to keep its water system in proper repair for fire-fighting purposes.

*Id.* (citations omitted).

The negligent failure to supply sufficient water for firefighting is not actionable in Indiana either. There, the Court of Appeals stated:

Essentially, we affirm the long recognized common law rule that a municipality is not liable to an owner of property destroyed by fire even though the destruction may have resulted from the failure to provide suitable equipment or an adequate supply of water with which to fight the fire, i.e., insufficient water pressure, insufficient lengths of hose, or improperly functioning hydrants.

*Gates v. Town of Chandler Water Department*, 725 N.E. 2d 117, 119 (Ct. App.), *transfer denied*, 735 N.E.2d 238 (Ind. 2000). *See also*, *Jolly v. Ins. Co. of North America*, 331 S.2d 368, 370 (Ct. App. Fla. 1976).

#### C. THE “DUAL CAPACITY” PRINCIPLE.

When a city engages in a business activity that is generally performed by a private company, it engages in a “proprietary” function. Such examples include water and power utilities. However, the provision of services such as fire suppression and law enforcement are plainly for the public good, and thus are “governmental” functions.

This Court recently recognized that a public agency can operate in a *dual capacity* -- both governmental and proprietary -- *depending on the specific activity at issue*:

Providing streetlights, however, is a governmental function because they operate for the benefit of the general public

and not for the “comfort and use” of individual users. City Light customers have no control over the provision or use of street lights hence, while the electric utility itself is a proprietary function of government, the maintenance of street lights is a governmental function.

*Okeson v. City of Seattle*, 150 Wn.2d 540, 541-42, 78 P.3d 1279 (2003) (emphasis supplied).

This dual capacity analysis is directly analogous to the situation here. Charging customers to provide electricity (or water) for in-home use is a *proprietary* function. But, providing electricity for streetlights (or water for fire suppression) is a *governmental* function. Simply looking at one side (the water department) is not enough. We must ask *in what capacity was the water system used?* In this case, the water was plainly supplied for the benefit of the general public – firefighting.

Courts across the country have reached the conclusion that a municipal water works utility operates in a “dual capacity.” When the utility operates to supply drinking water to its customers it is acting in a *proprietary* capacity. However, when the utility supplies that very same water for firefighting it operates in a governmental capacity.

The Kansas Supreme Court has concluded likewise. *Perry v. City of Independence*, 69 P.2d 706 (Kan. 1937). That Court discussed the “dual capacity” of a city operating a water supply system. The court held:

It cannot be doubted that a city may maintain a municipal

water plant and operate it in a dual capacity. While the city is maintaining the water system for the use of its fire department, it is performing a public governmental function and is not liable for the negligence of its officers or servants in the establishment or maintenance for the benefit of the fire department.

*Id.* (quoted with approval, *Cross v. City of Kansas City*, 638 P.2d 933 (Kan. 1982) (emphasis supplied)).

The Supreme Court in Mississippi reached the same conclusion.

*Westbrook v. City of Jackson*, 665 S.2d 833 (Miss. 1995). There, the Court held:

This court has determined that the operation of a fire department is a governmental function. More specifically this Court has determined that the supply of water to prevent fires and firefighting in general is a governmental function. This principle holds regardless of whether the same supply provides drinking water, which is a proprietary activity.

*Id.* (emphasis supplied).

In *Gilbertson v. City of Fairbanks*, 262 F.2d 734 (9<sup>th</sup> Cir. 1959), .

the Ninth Circuit held:

The prevailing view is that no municipal liability exists from the negligent failure to supply water for the extinguishment of fire, even though some of the same water system might be used by the municipality in a proprietary way to furnish water to the general public. The essence of the charge against the municipality in such type of case is the municipality's failure to properly extinguish the fire which is a governmental function.

*Id.* at 738 (emphasis supplied). See also, *Jaramillo v. Callen Realty*, 588

NYS.2d 61 (Sup. Ct. NY 1992) (the duty of a city to furnish water for fighting of fires inures to the benefit of the public at large rather than to any specific person), *affirmed*, 607 NYS.2d 226 (NY App. Div. 1994).

A Massachusetts court has likewise acknowledged the “dual capacity” of a water department.

Regardless of how the plaintiffs try to characterize their sprinkler systems, the city was providing water for use in the sprinklers for fire protection. “A municipality operating water works pursues that activity in a dual capacity. So far as it undertakes to sell water for private consumption, the city engages in commercial venture, functions as any other business corporation, and is liable for the negligence of its employees. In so far, however, as the municipality undertakes to supply water to extinguish fires, it acts in a governmental capacity and cannot be held liable for negligence on the part of its employees.”

*Gans Tire Sales Co., Inc. v. City of Chelsea*, 450 NE.2d 668, 669 (Ct. App. Mass. 1983) (quoting *Nashville Trust Co. v. Nashville*, 188 SW.2d 342 (1945) (emphasis supplied)).<sup>2</sup>

**D. THE LEGISLATIVE INTENT EXCEPTION DOES NOT APPLY.**

The only recognized exception to the public duty doctrine that

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<sup>2</sup> See also, *Ross v. City of Houston*, 807 SW.2d 336, 338 (Ct. App. Tex. 1991) (city is not liable for property burned where the city failed to supply water); *Jolley v. Insurance Company of North America*, 331 S.2d 368 (Ct. App. Fl. 1976) (the duty to supply adequate water for fire fighting is a duty owed to the public generally and not to particular plaintiffs as it is a governmental function).

could possibly apply here is the “legislative intent” exception.

**1. Intent to Protect a Particular Class is Required.**

Liability “can be founded upon a municipal code, if that code by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons.” *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988) (quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978) (emphasis supplied). Only one<sup>3</sup> case has ever found a public welfare statute to create a duty to an individual.

Defendant City of Kirkland expressly limited (by ordinance) any liability in damages for “insufficient volume, inadequate pressure, or interruption of service” of its water system. KMC 15.16.020 (attached as Appendix A).

Here, the most closely analogous case is *Taylor v. Stevens County*. No duty was found there. The plaintiffs contended that the Uniform Building Code, as codified in the Building Code Act, Ch. 19.27 RCW, created a legal duty to them. The court focused on the Purpose section of the Act, which provided:

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<sup>3</sup> This Court has found an express, clear intent to protect individuals only in *Halvorson v. Dahl*. There, the City of Seattle had created a housing code with the express purpose of protecting the individual occupants of substandard, dangerous housing. The intent section was very specific in addressing this intent to protect. The Seattle Housing Code was an ordinance enacted for the “benefit of a specifically-identified group of persons as well as, and in addition to, the general public.” *Id.* at 677.

To promote the health, safety and welfare *of the occupants or users of buildings and structures and the general public.*

*Taylor, supra*, at 164 (quoting former RCW 19.27.020) (italics in original).

The plaintiffs in *Taylor* were harmed by numerous violations of the county building code constitution construction defects of their home. The county building inspector was aware of the defects and violations but did not order them to be remedied. *Id.* at 161-62. This Court in *Taylor* reasoned that building codes and inspections “are devices used to secure to local government the consistent compliance with zoning and other land use regulations and code provisions governing the design and structure of buildings.” *Id.* at 164. They were not intended to protect individuals, but rather the general public.

No duty was found in *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 118 (1988) either. This Court rejected the notion that a Department of Agriculture statute created a duty to specific individuals. There, plaintiffs suffered a significant loss when their cattle became infected with brucellosis, which they contended that state employees knew of and could have prevented.

This Court held the statutes at issue in *Honcoop* were “enacted pursuant to the police power for the ‘public welfare’ and the ‘public

health' of the people of Washington." *Id.* The statute in question provided:

Whenever in the opinion of Director of Agriculture, upon the report of the Supervisor or a duly appointed and qualified veterinarian in the Division of Dairy and Livestock *the public welfare demands the destruction of any animal found to be affected with any infectious, contagious, communicable or dangerous disease* he shall be authorized by a written order to direct such animal to be destroyed....

*Honcoop, supra*, at 188-89 (quoting former RCW 16.36.090) (emphasis in original). This language created a duty to the public in general, not to any specific individual.

Lastly, in *Baerlein v. State*, 92 Wn.2d 229, 595 P.2d 930 (1979), this Court rejected the claim that the State Securities Act regulatory scheme created any duty to individual investors. The statutes contained no "clear intent" to identify a specific class of plaintiffs to be protected. *Id.* The court held:

The statutory provisions relied upon by Plaintiffs do not indicate a clear legislative intent to impose a duty as to individual investors. Rather, they show an attempt by the Legislature to bring order and regulation to the securities industry which will "inure to the protection of investors as a class and the public generally."

*Id.* at 233.

The court in *Baerlein* also observed that "there is no declaration of

purpose in the Securities Act and the preamble of the Securities Act of 1923, the predecessor to the present statute, contains no declaration of purpose to protect individual investors.” *Id.* at 234. The statute on which Plaintiffs rely has no purpose or intent section either.

**2. There Is No “Clear Intent To Identify and to Protect” In The WUTC Statute.**

The general WUTC statute does not create a duty. There is no “clear intent” *to identify and to protect* individual drinking water customers from fire-related hazards.

The statute dealing with private water departments is a general public welfare provision. It provides for the maintenance of companies’ facilities for the public good.

Every gas company, electrical company and water company shall construct and maintain such facilities in connection with the manufacture and distribution of its products as will be efficient and safe to its employees *and the public.*

RCW 80.28.010 (8) (emphasis supplied).

The section also mandates that charges for gas, electricity or water must be “just, fair, reasonable and sufficient.” RCW 80.28.010(1). Services and facilities must be “just and reasonable.” RCW 80.28.010(2). And, rules and regulations issued by these companies must be “just and reasonable.” RCW 80.28.010(3). All of the sections are for the general

public good. They are certainly not written so specifically as to express an intent to protect a circumscribed class of individuals.

The organic authority for the Utilities and Transportation Commission further establishes that the statute on which Plaintiffs base their claim is a general public welfare statute upon which no individual duty rests. The Legislature in creating the UTC provided that among its powers, the WUTC shall:

*Regulate in the public interest as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging with the state in the business of applying any utility service or commodity to the public for compensation, and related activities; including but not limited to electrical companies, gas companies, irrigation companies, telecommunications companies, and water companies.*

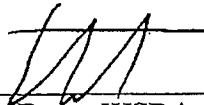
RCW 80.01.040(3) (emphasis supplied).

## II. CONCLUSION

This court should affirm the trial court's dismissal of Plaintiffs' Complaint.

DATED this 11<sup>th</sup> day of October, 2007.

KEATING, BUCKLIN &  
McCORMACK, INC., P.S.



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## **APPENDIX A**

### **Kirkland Municipal Code**

#### **Chapter 15.16**

#### **GENERAL RULES AND CONDITIONS OF SERVICE**

##### **15.16.020 Volume and pressure—City not liable.**

The city makes no commitments as to the volume of water available, pressure per square inch or continuity of service, and will not be liable for injuries or damages due to insufficient volume, inadequate pressure or interruption of service.

(Ord. 3368 § 6 (part), 1993: Ord. 2062 § 4.02, 1969)

[http://kirklandcode.ecitygov.net/CK\\_KMC\\_Search.html](http://kirklandcode.ecitygov.net/CK_KMC_Search.html)